IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4870 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SOMABHAI MASARUBHAI RABARI

Versus

COMMISSIONER OF POLICE

Appearance:

MR ASIM J PANDYA for Petitioner

Mr. K.T. Dave, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 01/02/2000

ORAL JUDGEMENT

Heard learned Advocate Asim Pandya for the petitioner and learned A.G.P. Mr. K.T.Dave, on behalf of the respondents nos.1, 2 and 3.

1. The detention order dated 19-5-1999 passed by the Commissioner of Police, Ahmedabad (the respondent no.1) against the petitioner-detenu in exercise of powers conferred under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985("PASA" for short) is challenged in the present petition filed under Article 226 of the Constitution of India.

2. The grounds of detention served to the petitioner -detenu under Sec.9(1) of "PASA" , copy of which is produced at Annexure "C" inter alia indicate that a prohibition case was registered against the petitioner -detenu on 6-12-1998 at Nashabandi South Division Police Station and Indianmade foreign liquor has been seized from the possession of the petitioner-detenu. The matter is pending investigation.

2.1 The grounds of detention further indicate that two witnesses have given statements dated 19-5-1999 regarding bootlegging activities of the petititioner-detenu and have related the alleged incidents dated 20-4-1999 and 25-4-1999 respectively.

3. That in consideration of the aforesaid material, the respondent no.1 as detaining authority has come to the conclusion that the petitioner is a "bootlegger" within the meaning of Section 2(b) of " PASA". That resort to general provisions of law being insufficient to prevent the petitioner from continuing his antisocial activity and as such, the impugned order is passed.

4. The petitioner has challenged the impugned order on numerous grounds. It has been contended on behalf of the petitioner at the Bar that impugned order suffers from the vice of non application of mind inasmuch as the

detaining authority while formulating the grounds of detention has stated that accomplice of the petitioner-Bharatbhai alias Badshah Ishwarbhai Patel was detained under the provisions of "PASA" vide order dated 30-12-1998, copy of which is supplied with accompanying documents to the detenu. However, factum of revocation of said order on 19-1-1999 has not been stated in the grounds of detention which suggests that the detaining authority has failed to take into account the said fact which could have tilted the balance in favour of the petitioner-detenu. That the petitioner has raised the specific contention vide paragraph 19 of the petition, but there is no satisfactory reply despite filing of affidavit dated 20-11-1999 by the detaining authority.

As such, non consideration of relevant material regarding revocation of order of accomplice and not disclosing the said fact in the grounds of detention has vitiated the subjective satisfaction reached by the detaining authority and has rendered the impugned order invalid.

5. It is further submitted that on the date when the impugned order is passed, the petitioner was in judicial custody as stated in the grounds of detention, however, without considering the less drastic remedy like opposing and/or claiming cancellation of bail under Sec.437(5) Cr.P.C., the impugned order is passed, and therefore also, the subjective satisfaction of the detaining authority stands vitiated rendering the impugned order bad in law.

6. That in the matter of ZUBEDABIBI RASIDKHAN PATHAN VS. STATE OF GUJARAT AND ORS. (1995 (2) G.L.H. 1134), the Division Bench of this Court has expressed the view that non consideration of less drastic remedy like cancellation of bail under Section 437(5), Cr.P.C. amounts to non application of mind vitiating the detention order. That the said view has been approved and endorsed in the proceedings of Letters Patent Appeal no.1056/99 decided on 15-9-1999 by this Court (Coram:C.K.Thakkar & A.L.Dave,JJ.).

6. On scrutiny of papers, it appears that the respondent no.1 as detaining authority has failed to consider less drastic remedy like cancellation and/or opposing the bail. It is observed in the grounds of detention that though the petitioner is in judicial custody, however, by passage of time, he would be produced in Court or he would apply for bail and after getting himself released on bail he is likely to indulge into antisocial activity. Thus, the impugned order appears to be based on apprehension and not on fact as the grounds of detention does not disclose the factum of revocation of order of co-accused Bharatbhai alias Badhshah Ishwarbhai Patel as stated hereinabove and in view of the said fact, it is difficult to sustain the order.

7. As the petition succeeds on the aforesaid grounds, it is not necessary to consider and decide the other contentions raised in the petition.

8. On the basis of the aforesaid discussion, the petition is allowed. The impugned order of detention dated 19-5-1999 passed by the Commissioner of Police, Ahmedabad (respondent no.1) is hereby quashed and set

aside. The petitioner-detenu-Somabhai Masarubhai Rabari is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly.

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